RECORD AND BRIEFS

No. 15-1439

Supreme Court, U.S.
FILED
JUN - 6 2017
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CYAN, INC., *et al.*,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES' RETIREMENT FUND, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the Court of Appeal of the State of California,
First Appellate District

RESPONDENTS' SUPPLEMENTAL BRIEF

Thomas C. Goldstein
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636

Robert V. Prongay
Ex Kano S. Sams II
GLANCY PRONGAY & MURRAY LLP
1925 Century Park East
Los Angeles, CA 90067
(310) 201-9150

Andrew S. Love
Counsel of Record
Susan K. Alexander
John K. Grant
Kenneth J. Black
ROBBINS GELLER RUDMAN & DOWD LLP
Post Montgomery Center
One Montgomery Street
Suite 1800
San Francisco, CA 94104
(415) 288-4545
alove@rgrdlaw.com

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

RESPONDENTS' SUPPLEMENTAL BRIEF 1

I. Certiorari Should Be Denied With Respect To The Question Presented 1

II. Certiorari Should Be Denied With Respect To The Proper Construction Of The Removal Provision Of Section 77p(c) 4

A. The Interpretation Of Section 77p(c) Is Not Properly Before The Court 4

B. The Solicitor General's Interpretation Of Section 77p(c) Lacks Merit 8

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Clark v. Jeter,
486 U.S. 456 (1988) 6

Ellis v. Natera, Inc.,
No. 16-16576 (9th Cir. docketed Mar. 29, 2016) 2

Kircher v. Putnam Funds Trust,
547 U.S. 633 (2006) 1, 9, 10, 11

Luther v. Countrywide Fin. Corp.,
125 Cal. Rptr. 3d 716 (Cal. App. 2011) 2

Statutes

15 U.S.C. § 77p ..... passim

15 U.S.C. § 77v 4, 8, 9

Other Authorities

Cyan Defendants' Reply in Support of Their Motion for Judgment on the Pleadings for Lack of Subject Matter Jurisdiction (filed Oct. 16, 2015) 6

Memorandum of Points and Authorities in Support of Cyan Defendants' Motion for Judgment on the Pleadings for Lack of Subject Matter Jurisdiction (filed Aug. 25, 2015) 6

RESPONDENTS' SUPPLEMENTAL BRIEF

The Solicitor General recommends that this Court grant certiorari and issue a two-part opinion. First, with respect to the Question Presented, the opinion would affirm the superior court's judgment that it has jurisdiction to decide respondents' suit, which asserts only claims under the 1933 Securities Act. CVSG Br. 6-12. Second, the Court's opinion would state in dictum that under 15 U.S.C. § 77p(c) petitioners could have removed the case to federal district court for decision on the merits. *Id.* 13-17.

That recommendation lacks merit. With respect to the Question Presented, the Solicitor General correctly recognizes that the superior court's ruling is correct and that it is not the subject of any conflict among the federal or state appellate courts. Moreover, there is no dispute that if a conflict does emerge the issue can easily reach this Court in another case arising from the state courts. *See* Part I, *infra*. With respect to the removal provision in Section 77p(c), the Solicitor General's brief recognizes that the issue is not encompassed within the Question Presented, has been disavowed by petitioners, and is outside this Court's jurisdiction. Moreover, this Court expressly rejected the Solicitor General's interpretation of the statute in *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006). *See* Part II, *infra*.

The Petition should be denied.

I. Certiorari Should Be Denied With Respect To The Question Presented.

Everyone agrees that the Question Presented is not the subject of any disagreement between the state or federal appellate courts. *E.g.*, CVSG Br. 18. In fact,

only a single court of appeals – a California intermediate appellate court, in a ruling that is not even binding elsewhere in that one state – has decided the issue, ever. *Luther v. Countrywide Fin. Corp.*, 125 Cal. Rptr. 3d 716 (Cal. App. 2011), *cert. denied*, 565 U.S. 1080. That ordinarily would be reason enough to deny review.

The Solicitor General agrees with petitioners that the Question Presented can sometimes evade review in *federal* cases, because Congress has limited appeals of orders granting or denying remand to state court. CVSG Br. 18. That argument is substantially overstated. *See* BIO 11. For example, right now there is a "case pending in a federal court of appeals that raises the question whether Section 77v(a) eliminated state courts' concurrent jurisdiction over covered class actions raising only 1933 Act claims," in which briefing is nearly completed and the court of appeals specifically denied a motion for judgment on the pleadings "for lack of jurisdiction." CVSG Br. 18-19 n.6 (citing *Ellis v. Natera, Inc., et al.*, No. 16-16576 (9th Cir. docketed Mar. 29, 2016)).

But none of that even matters. No matter how appeals might progress in the twelve regional circuits, there are fifty other straightforward pathways to review in this Court. In fact, the government's singular focus on federal appellate review of the Question Presented overlooks that the issue regularly arises in *state* – not federal – court; in fact, it *always* arises there in the first instance. If the Question Presented is actually recurring and important, it will return here so that certiorari may be granted in another case if and when a conflict emerges.

The Solicitor General also recognizes that the superior court in this case – consistent with the overwhelming majority of the courts that have considered the Question Presented – correctly held that SLUSA did not eliminate state courts' concurrent jurisdiction over claims under the 1933 Securities Act. The state courts "correctly held that SLUSA did not divest it of jurisdiction over respondents' 1933 Act suit." CVSG Br. 6. Petitioners dispute that reading (Pet. Supp. Br. 8-10), but it is correct for the reasons set forth at length by both the government and respondents (BIO 16-22); there is no reason to repeat them again now for a third time. The judgment in the case thus does not represent a legal error that would otherwise weigh in favor of granting review.

Just as important, although the Question Presented has given rise to some disagreement among trial courts, the balance of rulings is entirely lopsided in respondents' favor. *See* BIO 12. The Solicitor General notes that some inconsistency remains, citing a single decision last year in Delaware. CVSG Br. 18. But again, the government's argument for granting certiorari on that basis sweeps far too widely. Thousands, if not tens of thousands, of legal questions are the subject of such thin disagreements among trial courts.

Certiorari accordingly should be denied with respect to the Question Presented.

II. Certiorari Should Be Denied With Respect To The Proper Construction Of The Removal Provision Of Section 77p(c).

A. The Interpretation Of Section 77p(c) Is Not Properly Before The Court.

The Solicitor General opines that this case hypothetically could have been removed to federal district court under Section 77p(c). CVSG Br. 13-17. But for four reasons – each independently sufficient – this Court cannot decide that issue in this case. To the extent the government's reading of the statute has merit, it is an important reason to *deny* certiorari and grant review instead in a later case in which the issue is properly presented. The benefits of waiting are particularly acute given that this issue is not yet the subject of any conflict in the lower courts; the existing thin disagreement among trial courts extends only to the discrete interpretation of "Section 77v(a)'s 'except' clause." *Id.* 17.

First, the Question Presented does not encompass whether this case could have been removed under Section 77p(c). Instead, the question is "[w]hether state courts lack subject matter jurisdiction over covered class actions that allege only '33 Act claims." Pet. i. Nor is the issue the Solicitor General would introduce otherwise lurking below the Petition's surface. Not even petitioners in their Supplemental Brief suggest that it is. There is only one "provision directly at issue in this case, 15 U.S.C. 77v(a)." CVSG Br. 6.

The Petition and Reply Brief do not contain any material discussion of Section 77p(c). Together, they cite that provision only a single time: for the purpose

of *rejecting* it as an independent basis for removal. The Petition thus explains that removal under Section 77p(c) is limited to cases that are subject to dismissal under Section 77p(b) – precisely the argument the Solicitor General rejects. Pet. 7 ("SLUSA also precluded covered class actions alleging state-law securities claims, *see* 15 U.S.C. § 77p(b), and permitted *such precluded actions* to be removed to and dismissed in federal court, *see id.* § 77p(c)." (emphasis added)). As explained by the Solicitor General, "Petitioners contend (*e.g.*, Pet. 25, 27) that, unless Section 77v(a)'s 'except' clause is read to divest state courts of jurisdiction over 1933 Act suits like these, SLUSA cannot achieve its purpose of preventing circumvention of the PSLRA's substantive and procedural requirements." *Id.* 13. But according to the Solicitor General, the argument set forth by the Petition is "wrong." *Id.*

Second, petitioners did not seek to remove the case under Section 77p(c). Instead, "[p]etitioners moved for judgment on the pleadings for lack of subject-matter jurisdiction." CVSG Br. 4; *see also id.* 20. As the Solicitor General finally acknowledges in a footnote, "Because petitioners did not seek to remove this case to federal court, but instead asked the state court to dismiss on jurisdictional grounds, the question whether removal under Section 77p(c) would have been permissible is not squarely presented here." *Id.* 15 n.3. And by "not squarely," the government understates petitioners' complete failure to raise the issue.

Moreover, as in the Petition, petitioners repeatedly argued in the state courts that Section 77p(c) is not an independent basis to remove this case.

Petitioners did not merely "ignore" SLUSA's exception to the removal prohibition. *Contra id.* 13. They affirmatively argued it was not an independent basis for removal. *See, e.g.*, Memorandum of Points and Authorities in Support of Cyan Defendants' Motion for Judgment on the Pleadings for Lack of Subject Matter Jurisdiction 10-11 (filed Aug. 25, 2015); Cyan Defendants' Reply in Support of Their Motion for Judgment on the Pleadings for Lack of Subject Matter Jurisdiction 1-2 (filed Oct. 16, 2015).

Third, not only was this issue not "pressed" by petitioners below, *see supra*, it also was not "passed upon" by any of the lower courts. It is therefore not subject to review in this Court. *See Clark v. Jeter*, 486 U.S. 456, 459-60 (1988). The trial court did not discuss whether Section 77p(c) was an independent basis for jurisdiction. Neither did the unexplained denials of the writ by the state court of appeals and supreme court.

Fourth, and most stark, this Court lacks jurisdiction to decide the issue. The Solicitor General argues – and petitioners now agree, reversing their prior position (Pet. Supp. Br. 4 n.1) – that jurisdiction exists in this Court because petitioners' request for a writ in the state appellate courts constitutes an independent judicial proceeding that is itself now "final." The Solicitor General argues that this Court has jurisdiction to review the "original proceeding initiated by the petition" for a writ in the state courts. CVSG Br. 20. But that point is fatal to the argument that this Court may determine whether petitioners could properly remove this case to federal district court under Section 77p(c). That is so because "that petition initiated an original proceeding on the topic of

the trial court's jurisdiction." *Id.* (emphasis added). The independent state court proceeding that supposedly is the basis for this Court's jurisdiction was thus strictly limited to whether the state courts could decide respondents' suit. It had nothing to do with the government's position that, assuming the state courts possess concurrent jurisdiction, petitioners nonetheless could have removed it to federal district court under Section 77p(c).[1]

Essentially ignoring all four independent barriers to review, the Solicitor General suggests that this Court should grant certiorari to "provide helpful guidance to lower courts about the scope of Section 77p(c)'s removal authorization." *Id.* 15 n.3. The government reasons that in deciding the Question Presented, "the Court could and should consider the structure and purposes of the overall statutory scheme." *Id.* That would undermine every accepted limitation on this Court's jurisdiction. On that view, whenever a case addresses one statutory provision (essentially every statutory case) the Court is free to decide the meaning of every related collateral provision, even when it lies outside the Question Presented, was disavowed below, contradicts the

---

[1] The Solicitor General confesses some "doubt" and "uncertainty" about whether the ruling below is the subject of a final judgment subject to review in this case, because there is no way to know whether the state court of appeals and supreme court denied the writ on federal or instead state-law grounds. CVSG Br. 19, 21. In particular, the court of appeal and supreme court did *not* hold that the trial court possessed jurisdiction; they did not hold anything *at all*. There is every reason to believe that those courts denied the writ on the ground that, for example, review would be more appropriate after a final judgment in the case.

essential theory of the petitioners, was neither pressed in nor passed upon by the lower courts, and is outside this Court's jurisdiction. That argument answers itself.

B. The Solicitor General's Interpretation Of Section 77p(c) Lacks Merit.

The statutory text plainly authorizes the removal of only cases "based upon the statutory or common law of any State or subdivision thereof." 15 U.S.C. § 77p(b). Because this case is instead based only on the 1933 Securities Act, it is not subject to removal.

Three interlocking provisions are at issue.

First, the 1933 Act's anti-removal provision, Section 77v(a), provides: "Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

Second, the cross-referenced Section 77p(c) provides: "Any covered class action brought in any State court involving a covered security, *as set forth in subsection (b)*, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b)" (emphasis added).

Third, the incorporated Section 77p(b) provides: "No covered class action *based upon the statutory or common law of any State or subdivision thereof* may be maintained in any State or Federal court by any party alleging" fraud (emphasis added).

Thus, Section 77v(a) prohibits removal except for suits described in subsection (b), which are those arising under state law.

Indeed, the Solicitor General's brief elsewhere makes this very point. The government explains:

> By its terms, [Section 77p(b)] provision addresses *only certain class actions brought under state law*, and it has no meaningful application to the 1933 Act suits that are referenced in Section 77v(a). Moreover, Section 77p(b) precludes both state and federal courts from hearing the specified state-law class actions. *Section 77p(b) therefore does not limit the concurrent state-court jurisdiction over 1933 Act claims that Section 77v(a) generally provides.*

CVSG Br. 7 (quoting 15 U.S.C. § 77p(b) (second and third emphases added)). Petitioners themselves explain that the Solicitor General's reading of Section 77p(c) cannot be reconciled with the government's own understanding that Section 77p(b) is limited to state law suits. *See* Pet. Supp. Br. 8-10.

Indeed, this Court rejected the Solicitor General's interpretation in *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006). There, the Court held that an order remanding a securities class action to state court is not appealable. The Court reasoned that removal under Section 77p(c) is "limited to those precluded by the terms of subsection (b)." *Id.* at 642; *see also* CVSG Br. 16 (*Kircher* "stat[es] that 'removal jurisdiction under subsection (c)' should be 'understood to be restricted to precluded actions defined by subsection (b)" (quoting 547 U.S. at 643-44)). That reading of the statute is irreconcilable with the government's position that

Section 77p(c) authorizes the removal of suits brought under the 1933 Securities Act that are not precluded from state court jurisdiction under subsection (b).

The Solicitor General responds that, in the course of reaching that conclusion, *Kircher* also "stated that removal under Section 77p(c) is 'confined to cases 'set forth in subsection (b),' namely, those with claims of untruth, manipulation, and so on.'" CVSG Br. 15 (quoting 547 U.S. at 642). But that sentence is completely consistent with the Court's holding that removal is not independently authorized for cases that are not excluded from state court jurisdiction.

Moreover, the government's reading is "inconsistent with SLUSA's overall structure and purposes." CVSG Br. 9. SLUSA is directed at "'State private securities class action lawsuits'" that would otherwise evade the strict pleading requirements introduced by the Private Securities Litigation Reform Act. *Id.* 2 (quoting SLUSA § 2(5)). SLUSA is not directed at federal law suits such as this one brought under the 1933 Act. The Solicitor General essentially recognizes that fact in concluding that SLUSA preserves the state courts' concurrent jurisdiction over suits under the 1933 Act. CVSG Br. 8-9.

The Solicitor General's only contrary argument is that Congress "would not likely have denied defendants access to a federal forum for adjudication of the merits of analogous 1933 Act claims." *Id.* 14. There is no support for that contention, and the government cites nothing at all in support of it. As the Solicitor General elsewhere explains, *see supra*, SLUSA is targeted at prohibiting altogether state law suits that are in substance federal securities fraud class actions by another name. It is not concerned

with claims under the 1933 Act. Congress has long granted state courts jurisdiction over those claims; SLUSA does not strip that jurisdiction.

Because the Solicitor General's reading of Section 77p(c) is both irreconcilable with the statutory text and precluded by *Kircher*, there is no reason to discard this Court's ordinary jurisdictional principles to decide that issue in this case in which it is not properly presented.

CONCLUSION

For the foregoing reasons and those set forth in the Brief in Opposition, certiorari should be denied.

Respectfully submitted,

Andrew S. Love
Counsel of Record
Susan K. Alexander
John K. Grant
Kenneth J. Black
ROBBINS GELLER RUDMAN
& DOWD LLP
Post Montgomery Center
One Montgomery Street
Suite 1800
San Francisco, CA 94104
(415) 288-4545
alove@rgrdlaw.com

Thomas C. Goldstein
GOLDSTEIN &
RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814

(202) 362-0636

Robert V. Prongay
Ex Kano S. Sams II
GLANCY PRONGAY &
MURRAY LLP
1925 Century Park East
Suite 2100
Los Angeles, CA 90067
(310) 201-9150

June 6, 2017